No. 48816-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent

vs.

SCOTT JESUS BARAJAS

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR GRAYS HARBOR COUNTY
The Honorable STEPHEN BROWN
Superior Court No. 15-1-00451-7

APPELLANT'S OPENING BRIEF

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2. Appellant did not receive effective assistance of counsel in violation of the Sixth Amendment, and Art. I §22.

3. The trial court erred in denying the defense motion to suppress evidence flowing from the illegal detention of Mr. Barajas.

4. The trial court erred in admitting proof of prior convictions for a no–contact order violation when the documents offered in evidence did not indicate which statute had been violated.

5. There was insufficient evidence to convict Mr. Barajas of a felony violation of the no– contact order statute.

6. The trial court erred in the calculation of Mr. Barajas's offender score on Count I, since the state did not provide evidence that Mr. Barajas had been convicted of two previous no contact order violations that had been both pled and proven that the offense was committed against a family or household member.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Article I §12 violated by the prosecutor's unfettered discretion to file felony identity theft charges in lieu of misdemeanor obstructing or false statement charges? (Assignment of Error 1)

2. Should this court give an interpretation to Art. I §12 which is more protective of individual rights than the Fourteenth Amendment to the United States Constitution? (Assignment of Error 1)

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6. Did the state provide sufficient evidence that both of Mr. Barajas prior misdemeanor convictions had been both pled and proven to be committed against a family or household member, as required by RCW 9.94A.525 (21)(c)?

III. STATEMENT OF THE CASE

A. Procedural History

Mr. Barajas was charged by an amended information with identity theft in the second degree, RCW 9.35.020 (3) and felony violation of a no–contact order, RCW 25.50.110 and 10.99.020. CP 4-5. A hearing was held on his motion to suppress evidence flowing from an illegal detention on February 17, 2016. The court denied the motion. RP II 37-44.[1]

The case proceeded to trial on March 1, 2016 before the Honorable Stephen Brown and a jury. After the state rested, RP I 45, the defense moved to dismiss both counts. Defense counsel argued that the state had not proven the existence of any prior no–contact order violations to elevate the crime to a felony, and had not proven that Mr. Barajas had used the identity of an actual person. RP I 46. The state moved to re–open its case to offer copies of the prior conviction documents into evidence. RP I 46. Recognizing that unless the court granted the motion to re–open,

[1] RP I will refer to the verbatim report of trial proceedings held March 1, 2016, and the sentencing hearing held April 1, 2016. RP II will refer to

there would be insufficient evidence to elevate the no–contact order violation to a felony, the court granted the motion to re–open and denied the motion to dismiss. RP I 51. The court then ruled that the evidence the state had presented concerning the identity of the person in the prior conviction documents was sufficient to deny the motion to dismiss that count. RP I 54. The defense rested without making an opening statement and without presenting any evidence. RP I 55, 58. Defense counsel took no exceptions to the court's instructions. RP I 57.

The jury returned verdicts of guilty on both counts. CP 46-47. The jury also returned a special verdict finding that Mr. Barajas and Ms. Collins were family or household members. The court sentenced Mr. Barajas to 60 months, which was a maximum sentence for the no–contact order violation. He was given a concurrent sentence of 43 months on the identity theft charge. RP I 106, CP 54-65. The court reached its calculation of the offender score by utilizing the prior convictions which had elevated the protection order violation to a felony as two additional points toward Mr. Barajas' offender score, which pushed him to the 9+ column on the chart. The only evidence the state produced about the prior convictions was a court order from a Pierce County case, and a judgment and sentence from the Aberdeen Municipal Court. Ex. 5 and 6, Supp. CP. The court also included a point for being on community custody at the time of the commission of the offenses. RP I 104. Mr. Barajas filed a timely notice of appeal. CP 66.

B. Motion to Suppress

Officer Staab of the Westport police was monitoring traffic, and randomly checked the plate of a passing silver sedan, which was expired. RP II 4-5. When he stopped the car, a man got out of the car's passenger side and walked away out of his sight. RP II 6. Staab considered it unusual that the passenger would get out, but took no further action at that time regarding the passenger. RP II 7. He noticed that the man was Hispanic. RP II 18-19.

The driver of the car was Lisa Collins. She produced a passport when Staab requested she provide ID. Staab went back to his car to check on the status of her driver's license. He was informed by his dispatcher that she was suspended and had warrants for driving while suspended. RP II 7. She was also the protected party in a protection order. RP II 7-8. The prohibited person in the no–contact order was Scott Barajas. RP II 8.

The man who had gotten out of the car resembled the physical description of the person in the order, because he appeared to match the height and weight of the person in the order. RP II 9-10. Staab went to look for the man, who apparently had gone into a Sani–can next to the building where the stop had taken place. One of the store employees pointed at the Sani–can, which to Staab indicated that was where the man had gone. Then Staab returned to ask the driver who the passenger was. RP II 12. She said his name was Brian, and she did not know his last name. RP II 13.

Staab went back to the Sani–can, knocked, and then opened the door, and asked the occupant his name. Defendant said he was Michael Barajas. RP II 12, 20. Since the two people associated with the car had given two different names for the passenger, Staab became suspicious. He "requested" that defendant return to his patrol car with him. RP II 13. Back at his patrol car, he obtained a picture of the person named in the order on his car computer. It looked like the man who had just identified himself as Michael Barajas. RP II 13-14. He placed Mr. Barajas in his car and handcuffed him. RP II 14, 21. Staab went back to Collins' car to ask her again who her passenger was. She eventually admitted it was Scott Barajas. RP II 14. He then arrested Mr. Barajas, searched him, and found his identification. RP II 14.

C. Trial Testimony

While on routine patrol, Brad Stabb, a Westport police officer, saw a car with expired registration tabs. When he ran the plates, there was also an indication the car had been sold without a proper transfer of title. RP I 20-22. He signaled the car to stop, and it did. Before he got out of his car, a man got out of the passenger side of the car, looked back at him, and then walked over to a gas station.The man was Hispanic. RP I 23. In Staab's experience, it was uncommon for a passenger to get out of the car when he is making a traffic stop, but he did not try to stop the passenger, as there was no indication the passenger had violated any law. RP I 23.

Staab then got information from the driver, Lisa Collins, and called it in. RP I 23-24. Staab was told Ms. Collins had warrants out for her arrest, and also that she was the protected party in a no–contact order. RP I 25-26. Staab was told the restricted party in the no–contact order was a person named Scott J. Barajas. RP I 26. The physical description in the no–contact order (later admitted as Exhibit 2) appeared similar to the man who had been the passenger who had walked away from the car, so the officer decided to look for him. RP I 27.

Staab attempted to make contact with the passenger. He was directed by an employee of the gas station to a Sani-can located by the gas station. RP I 28. He went back to the car to ask Ms. Collins who the passenger was, and then knocked on the door of the Sani-can, and pulled it open. RP I 28-29. Mr. Barajas was inside the Sani-can. Upon inquiry by the officer, the passenger gave his name as Michael Barajas, and gave a birth date of July 28, 1988. RP I 29-30. Stabb detained Mr. Barajas and brought him back to the patrol car. Using his patrol car computer, he got photos for Michael and Scott Barajas. RP 30-31. These were admitted as Exhibits 3 and 4. RP 31-32. He arrested Mr. Barajas, and searched him. RP I 32. He had an identification card with the name of Scott J. Barajas. RP I 35.

The state also called Michael Barajas, who identified appellant as his brother, Scott Barajas. Michael Barajas had not given permission to his brother to use his name or date of birth, but that had never happened

before either. RP I 42-43. It did not bother him that his brother had given his name to the police. RP I 44.

After the state rested, the defense moved to dismiss both counts. The state was permitted to re–open its case, and offered two exhibits, Ex. 5 and 6, which purportedly represented Mr. Barajas' prior convictions for violation of a no–contact order. RP I 57-58.

D. Sentencing Hearing

Mr. Barajas asked the trial court to sentence him using the DOSA statute, but the court concluded that the two crimes involved had very little to do with drug use. RP I 100-101; 103-106. The court took into consideration the fact that Mr. Barajas was under community custody at the time, and noted the offender score for the no contact order violation was enhanced by the fact that Mr. Barajas had previous misdemeanor convictions for violating the no–contact order with Ms. Collins. RP I 104-106, CP 54-65.

IV. ARGUMENT AND AUTHORITY

A. Mr. Barajas's conviction for identity theft in the second degree violates Art. I §12 of the Washington Constitution.

Mr. Barajas's conviction for identity theft was not based on his possession of any item of identification belonging to his brother, but simply because he gave his brother's name to the police officer instead of his own. Since the statute defines a name itself as a "means of

identification", see RCW 9.35.005[2], and prohibits its "use," this statute could be violated any time a person pretends to be someone else, as long as the requisite criminal intent to commit a crime is demonstrated. As one court has held, this can be the intent to commit the misdemeanor crime of making a false statement to a police officer. See *State v. Federov*, 181 Wn. App. 187, 324 P.3d 784 (2014).

As the trial court observed, Mr. Barajas' conduct in giving a false name to the officer constituted an attempt to obstruct the officer's investigation. By doing so, he may have committed either the crime of obstructing a law enforcement officer, or the crime of making a false or misleading statement to a public servant. [3]

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[2] "Means of identification" means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

[3] RCW 9A.76.020
Obstructing a law enforcement officer.
(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.
RCW 9A.76.175
Making a false or misleading statement to a public servant.
A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

In essence, the prosecutor chose to file a felony charge based on the very same conduct covered by either of two very specific misdemeanor charges. In doing so, the prosecutor's charging decision violated Art. I §12 of the Washington Constitution.

In *Olsen v. Delmore*, 48 Wn. 2d 545, 295 P.2d 324 (1956), our Supreme Court held that Art. I §12 was violated by a statute that proscribed different punishments for the same act committed under like circumstances. This case was followed by *State v. Zornes*, 78 Wn. 2d 9, 475 P.2d (1970), in which the court held that the same constitutional invalidity occurred when two operative statutes allow the prosecutor to select either a felony or a misdemeanor for charging essentially the same conduct. The same analysis was also applied to a case involving a Seattle ordinance that provided for a greater penalty than an identical state statute in *State v. Mason*, 34 Wn. App. 514, 663 P.2d 137 (1983).

Subsequently, in *City of Kennewick v. Fountain*, 116 Wn.2d 189, 802 P.2d 1371 (1991), the court observed that *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), had overruled *Zornes* insofar as it had held that equal protection under the Fourteenth Amendment was violated by acts defining the same offense but prescribing different punishments. However, the court has not repudiated this analysis under the Washington Constitution Art. I §12. See *State v. Kirwin*, 165 Wn.2d 818, 203 P.3d 1044, 1051, (2009) (J. Madson, dissenting.)

In the present case, the prosecutor could conceivably have charged Mr. Barajas with either of two misdemeanor crimes instead of a felony for the same conduct, giving a false name to the police. When a prosecutor has the unfettered discretion to file a felony charge instead of a misdemeanor charge based on the same conduct, our state's equal protection clause is violated under the *Zornes* line of case referenced above.

This court should determine whether the interpretation of Art. I §12 in *Zornes* has maintained its validity in view of the *Batchleder* decision under the 14th Amendment to the United States Constitution. Pursuant to *State v. Gunwall*, *infra*, this court should give Art. I §12 an independent interpretation. In aid of that determination, appellant submits the following analysis which favors an independent interpretation of the state constitution in this context.

In *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), the court enumerated several nonexclusive criteria which a court should consider to determine whether, in a given situation, it is appropriate to resort to the Washington Constitution for separate and independent state grounds of decision: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

Text and Textual Differences

The text of the Fourteenth Amendment equal protection clause and the language of Art. I §12 are significantly different. The Fourteenth Amendment, passed as part of the post–Civil War reconstruction packet of amendments, provides in pertinent part that

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution Art. I, §12 is entitled "Special Privileges and Immunities Prohibited", and reads as follows:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

A significant difference in the text of parallel constitutional provisions is a basis for independent constitutional interpretation. See *Gunwall*, 106 Wn. 2d at 65.

Constitutional History

This provision is based upon the Oregon Constitution, and only one amendment was proposed, which lacked the two references in our current Constitution to corporations. Rosenow, *Journal of the Washington State Constitutional Convention of 1889*, (1999 Edition) at 500-501.

Pre–existing state law

This clause of our constitution has been given a broader interpretation that the Fourteenth Amendment. See *Darrin v. Gould*, 85 Wn.2d 859 , 540 P.2d 882 (1975) and *Carter v. University of Washington*, 85 Wn.2d 391, 536 P.2d 618 (1975). The *Zornes* line of cases had also been the prevailing law in Washington from 1956 until *Batchelder* in 1979. So there was a long history of interpreting Art. I §12 as a check on the power of the prosecutor.

Structural differences

As the *Gunwall* court pointed out, 106 Wn. 2d at 66-67, this factor usually weighs in favor of independent state constitutional review.

Matters of particular local concern

This factor also favors independent review. In the present context, the state has a strong interest in preventing the use of local law that is harsher than state law on a particular topic, and in promoting equitable charging policies statewide by prosecutors. The *Zornes* line of cases promotes this interest.

Overall, the factors set out by the *Gunwall* court demonstrate that Art. I §12 should be given an independent reading, such that this court is not bound by *Batchelder's* restrictive reading of the Fourteenth Amendment. Since the *Zornes* line of cases relies on Art. I, §12 as well as the Fourteenth Amendment, their holdings are still valid under state law. The prosecutor's choice to charge a felony in this case, as opposed to

either of the equally applicable misdemeanors, violates Art. I §12. This court should therefore vacate the conviction for identity theft in the second degree, and remand for sentencing.

B. Mr. Barajas received ineffective assistance of counsel as to Count I.

The prosecutor rested her case before offering any evidence that Mr. Barajas had been twice previously convicted of a no–contact order violation. This fact was essential to prove a felony conviction of the statute as opposed to a misdemeanor. Defense counsel moved to dismiss Count I based on this gap in the state's proof. Not surprisingly, the state moved for permission to re–open to offer the missing proof, which the court granted. By prematurely moving to dismiss at a time when the state would readily be able to cure the defect in proof, defense counsel provided ineffective assistance of counsel.

The standard for ineffectiveness of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S. Ct. 2052 (1984). To establish ineffective assistance, a defendant must first demonstrate that his lawyer's performance was deficient. Secondly, he must show he was prejudiced by the deficient performance. To meet the showing on the first prong, a defendant must show that the representation fell below an objective standard of reasonableness based on the circumstances. Regarding the second prong, a defendant does *not* have to show "that the

counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, *supra,* at 693. Rather, he need only show

> There is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, *supra* at 694.

There is no doubt that defense counsel was aware that upon resting, the state's case was incomplete. However, her deficient performance arises from her decision to prematurely expose this gap in the state's evidence at a time in the trial when the problem could easily be cured by a motion to reopen by the prosecutor.

Effective assistance of counsel required Mr. Barajas' lawyer to wait until closing argument to expose this weakness in the state's case, when there would be no possibility of curing the defect. Competent defense counsel would be aware of the fact that by raising the defect in proof before the case was submitted to the jury, and calling the prosecutor's attention to this defect, it was inevitable that the prosecutor would seek permission to re-open her case, and virtually inevitable that the court would grant the motion. As the trial court observed in granting the motion, this was a discretionary decision. RP I 51.

The deficient performance in the timing of exposing the gap in the state's proof had an obvious prejudicial impact. By prematurely raising the issue of a gap in the state's proof, defense counsel allowed the prosecutor to cure it. Had she waited to point this out to the jury during

closing argument, the prosecutor would have been unable to re-open her case. Without the proof of the prior convictions, Mr. Barajas could not have been convicted of the felony violation of a no–contact order, as the trial court recognized when granting the motion to reopen the case. RP I 51. There is obviously a reasonable probability that but for defense counsel's error, the results of the trial would have been significantly different since Mr. Barajas could not have been convicted of a felony level no–contact order violation.

The prosecutor may argue that defense counsel was not ineffective because the decision to move for dismissal at the close of the state's case was "tactical" in nature. It is true that courts will not find ineffective assistance of counsel if the action complained of is a legitimate trial tactic, *State v Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004), (citing *State v. Garrett*, 124 Wn. 2d 504, 520, 881 P.2d 185 (1994)), and does not fall below "'an objective standard of reasonableness based on consideration of all the circumstances.'" *Garrett,* 124 Wn.2d at 518, 881 P.2d 185 (quoting *State v. Thomas*, 109 Wn. 2d 222, 226, 743 P.2d 816 (1987)). But where the trial tactic is unreasonable, the court must reverse. *State v. Grier*, 150 Wn. App. 619, 208 P.3d 1221 (2009).

The decision to move to dismiss prematurely was not a legitimate trial tactic and did fall below an objective standard of reasonableness based on the circumstances. There was simply no legitimate tactical basis for alerting the state to a fatal weakness in its case at a time when this

could be easily cured. Competent counsel would be aware of the case law in Washington which gives free leave to re-open a case after resting, absent a strong showing of prejudice to the non–resting party.[4] There was literally nothing to be gained by alerting the state to the huge hole in its case at a time when the hole could be patched, as it was here. There was no danger of waiving the issue by not making the motion, since insufficiency of the evidence could even be raised even in a post-trial motion to arrest judgment under CrR 7.4 (a). The only competent time to raise this issue was after the evidence had been closed, and the jury instructed that they could not convict absent evidence of prior convictions. By moving to dismiss prematurely, defense counsel jettisoned her best chance of having her client convicted of a misdemeanor instead of a felony. This court should find that defense counsel was ineffective in prematurely raising this issue, and that Mr. Barajas suffered prejudice as a result of this deficient performance.

C. The trial court erred in denying the motion to suppress evidence.

In *State v. Rankin*, 151 Wn. 2d 689, 92 P.3d 202 (2004), our Supreme Court held that passengers in automobiles have a protected privacy interest which is violated when a police officer requests identification from the passenger, absent an independent basis for the

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[4] On a party's motion to reopen its case to present more evidence, the trial court's ruling should be upheld unless the complaining party can show a manifest abuse of discretion and that it suffered prejudice. *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992); *State v. Vickers*, 18 Wn. App. 111, 113, 567 P.2d 675 (1977); *State v. Johnson*, 1 Wn. App. 602, 464 P.2d 442 (1969).

request. A mere request for identification constitutes a seizure of the person from whom the demand for identification is made. *Rankin* at 697.

In *State v. Allen*, 138 Wn. App. 463, 157 P.3d 893 (2007), the police asked for identification of the driver of a car stopped for a defective license plate light. The driver was the protected person in a no contact order. The officer then asked for the identification of the passenger based on the assumption that the restricted party was also a man. Allen told the officer he did not have identification. Both the driver and the passenger gave the officer the same false name for the passenger as well as a date of birth and partial Social Security number. When the officer ran the false name, date of birth, and SSN, he was informed there was no match. He asked the driver to get out of the car, and then questioned her outside of the passenger's hearing about the passenger's name, after telling her he knew she had given a false name. The driver eventually gave the officer Allen's actual name. Allen was arrested for the no–contact order violation and ultimately charged with a drug offense after a search incident to the arrest.

The Court of Appeals reversed the conviction. It held that the questioning of Allen, the passenger, violated his right, and the information obtained by the officer's interrogation of the driver outside the car was not a lawful independent source, since her detention was longer than necessary to write her up for the infraction which had triggered the stop. The court also held that knowing that there was a

no–contact order in place for the driver did not justify the questioning of the passenger under *Rankin*.

In the present case, the police officer initially ignored the passenger who alighted from the car he had stopped, since he had no basis to believe that person had committed any crime. He subsequently determined from his check of the driver that there was an outstanding no–contact order between Ms. Collins and a person named Scott Barajas. He believed that the man he had seen leaving the car might be Scott Barajas, based on the height and weight description in the no–contact order. When he asked the driver who that man was, however, she told him the man's name was Brian, and that she did not know his last name.

The officer then determined to interrogate the passenger and seize him. Mr. Barajas was lodged at that moment in a place where he had a recognized privacy interest, a closed portable bathroom. See *City of Tukwila v. Nalder*, 53 Wn. App 746, 770 P.2d 670 (1989), *accord State v. Lawson*, 185 Wn. App. 349, 340 P.3d 979 (2014). The officer invaded this zone of privacy, removed Mr. Barajas from it, and demanded to know his name. Mr. Barajas was detained by the interrogation, and also because the officer then secured him in his patrol vehicle while he investigated further.

Under *Rankin* and *Allen*, the questioning of the passenger was a violation of Const. Art. I,§7, absent an independent justification for the demand for identification. The seizure and interrogation was also illegal

because Mr. Barajas was seized from an area where he had a constitutionally recognized privacy interest, the portable bathroom located outside the gas station. The evidence that was derived from this illegal seizure was used to convict him of the identity theft charge and the no–contact order violation.

The state argued below that the case of *State v. Pettit*, 160 Wn. App. 716, 251 P.3d 896 (2011) justified the seizure of Mr. Barajas. Pettit was the driver of a car which was stopped because of an equipment violation, namely a loud muffler. The police obtained Pettit's identification and determined he was the restrained party in a no–contact order. The protected party was a 16 year–old woman. Pettit's passenger was a 16 year–old woman. The police questioned her as well. She gave a false name. The police continued their investigation and found out that the protected party had a tattoo of the letter M on her left hand. So did the passenger. The police then arrested Pettit for the no–contact order violation.

The Court of Appeals affirmed the conviction, holding that the police could question and detain the passenger based on the existence of the no–contact order for a minor, and the minor's apparent age. The police could then continue the detention when the name and birthdate

turned out to be false,[5] which led them to the discovery of the identifying tattoo.

The *Pettit* court distinguished *Allen* on two significant grounds. First, it held that Pettit, as the driver, had no standing to context the questioning of his passenger, unlike Allen who had been questioned as a passenger. Second, it held that the fact that the protected person was a minor who had been reported missing constituted "exigent circumstances" which justified a more thorough inquiry by the police. 251 P.3d at 889.

Unlike *Pettit*, Mr. Barajas has standing in this case to contest his own questioning, which led to his conviction on both counts. Also, unlike *Pettit*, there were no "exigent circumstances" justifying his detention and questioning since no minors were involved. Finally, he was seized from a location where he had a recognized privacy interest compounding the violation of his privacy rights under Art. I, §7. This court should reverse both convictions based on his illegal seizure and detention.

D. The trial court erred in submitting one of the prior convictions to the jury as evidence to support the felony violation of a court order in Count I.

The state offered two documents as evidence of the element of conviction of a prior crime of violating a domestic violence court order. One was an order from the Pierce County District court, and the other

[5] The birthdate the passenger gave would have made her 20 years old, which apparently was at odds with her appearance.

was a judgment and sentence from the Aberdeen Municipal Court. The Pierce County order was deficient under *State v. Case*, 189 Wn. App.422, 358 P.3d 432 (2015). The trial court erred in submitting it to the jury. This court should vacate the conviction.

In *Case*, the Court of Appeals held that the trial court, acting as gatekeeper, had to determine that the evidence of prior convictions specified the type of no contact order of which the defendant had been convicted before it can be submitted to the jury as proof of the element that elevates a misdemeanor NCO charge to a felony:

> To enable the trial court to make this determination, the State must submit evidence to the trial court proving that the defendant's prior convictions were in fact for violating court orders *issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). Miller,* 156 Wash.2d at 31, 123 P.3d 827. [6] Only once the State produces such evidence can the trial court allow the State to submit evidence to the jury of a defendant's prior convictions for violating court orders. If no prior convictions are admissible, the defendant's charge for felony NCO violation must be dismissed. 358 P.3d at 435 (Emphasis added).

In *Case*, the state had relied upon a stipulation by the defendant that he had twice been convicted of violating the provisions of a protection order. The court held this was insufficient to support the conviction for a felony violation of RCW 26.50.110.

The same conclusion should be reached here. While the Aberdeen document does cite the statutory section it was based upon, RCW 26.50.110, the Pierce County document does not. It generically describes

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[6] *State v. Miller*, 156 Wn. 2d 23, 123 P.3d 827 (2005)

the offense as "no contact/protection order/DV" without specifying which of the several alternatives listed in RCW 26.50.110 (5) had been violated. No other document, such as the charging document, or a statement of defendant on plea of guilty, were submitted which might have supplied the missing information. Under *Case*, the Pierce County order should not have been submitted to the jury as evidence of the element of a prior conviction. This court should vacate the conviction in Count I and remand for resentencing on Count II only.

E. Count I should be vacated because the state did not prove the constitutional validity of either of the prior convictions.

As set forth above, the state only submitted two pieces of evidence to prove the element which raised a misdemeanor NCO violation to a felony. Neither of the documents submitted established the constitutional validity of the prior convictions.

In *State v. Holsworth*, 93 Wn. 2d 148, 607 P.2d 845 (1980), the state was prosecuting the defendant for being a habitual offender. The state had to prove at least two constitutionally valid convictions as the predicate for this offense. The *Holsworth* court held that the defendant could challenge the constitutional validity of the priors in the habitual offender proceeding without having to bring collateral attacks on the convictions first. In *Holsworth*, the challenge was to the constitutional validity of the guilty pleas which were the basis for the convictions.

In *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980), a prosecution for illegal possession of a firearm by an ex-felon, the court also held that the state had to prove the constitutional validity of the prior conviction which was a predicate for the current prosecution. The court again noted that *Swindell* did not have to collaterally attack the prior conviction in a separate proceeding, because he was challenging its present use as proof of an element of the crime in the current proceeding.

The state may argue that because Mr. Barajas' trial lawyer did not make any challenge to the constitutional validity of his prior convictions, this issue is waived. However, as with counsel's mishandling of the timing of the objection to the admissibility of this evidence, the failure to challenge the constitutional validity of the prior convictions constitutes ineffective assistance of counsel.

Effective assistance of counsel requires a trial lawyer to research the applicable law, including challenges to the elements of an offense, so as to be aware of potential challenges to the state's evidence. See *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980). The *Holsworth-Swindell* line of cases, which also includes *State v. Chervenell*, 99 Wn. 2d 309, 662 P.2d 836 (1983) has never been overruled in the context of prosecutions which require the proof of a previous conviction as a predicate for a new offense. A lawyer reviewing any of these cases would discover that she had to raise the issue of the constitutional validity of a prior conviction in order to defeat its admissibility in a proceeding where the prior conviction

is an element of the offense, as here. Counsel's apparent failure to be aware of this line of cases and their application to Mr. Barajas's case constitutes ineffective assistance of counsel under the *Strickland* test set forth in Part IV (B) of this brief.

Mr. Barajas can demonstrate prejudice under the *Strickland* test as well. Since the state was apparently prepared only to offer the two documents it did, it would not have been prepared to prove the constitutionality of the pleas of guilty which supported the two misdemeanor prior convictions. Without such proof, the priors could not have been admitted under *Holsworth* and *Swindell*, and Mr. Barajas would only have been convicted of a misdemeanor rather than a felony. There is a reasonable probability that the results of the proceeding would have been different, but for counsel's apparent failure to be aware of and raise this challenge to the state's prior conviction evidence. This court should vacate the conviction for Count I and remand for resentencing.

F. The trial court erred in determining Mr. Barajas' offender score on Count I.

Even assuming the validity of Mr. Barajas' conviction on Count I, the court should nevertheless remand for resentencing. The only evidence submitted by the state to support an additional two points for Mr. Barajas' offender score were the two documents from the Pierce County District Court and from the Aberdeen Municipal Court. The latter document did not prove that the state had both *pled and proved* that the victim of the

violation was a family or household member of Mr. Barajas'. The judgment cites only one of the two applicable statutory sections, RCW 25.50.110, but not the other, RCW 10.99.020. It contains a checkbox finding that the defendant committed the offense against another family or household member as defined by RCW 10.99.020. What is totally missing from the record is the charging document. There is no evidence that the prior conviction from Aberdeen Municipal Court was properly pled, as opposed to evidence that the offense was proven. In contrast, Exhibit 5, the Pierce County court order has a check box which recites that "DV pled and proved as to count (s) 1."

In order to count as part of the offender score for a felony domestic violence offence, RCW 9.94A.525 (21) provides, in pertinent part, as follows:

> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW , where domestic violence as defined in RCW , *was plead [pleaded] and proven after August 1, 2011. (Emphasis added).*

Since the Aberdeen sentencing document did not show on its face, as did the Pierce County order, that domestic violence had been both pled and proven, and the state offered no other documentation of the conviction, the trial court erred in using this conviction as part of the offender score on Count I. This court should vacate the sentence and remand for resentencing on this count.

V. CONCLUSION

The prosecutor's decision to charge the felony of identify theft in the second degree instead of either of two applicable misdemeanors, obstructing a police officer or making a materially false statement to a public servant violated Art. I §12 of the Washington Constitution. This court should vacate the conviction on Count II.

Defense counsel's premature motion to dismiss, which allowed the prosecutor to repair the gaping hole in her proof, constituted ineffective assistance of counsel. There was no justifiable tactical reason for not waiting to expose the weakness in the state's case during closing argument. There was a reasonable probability that the outcome would have been different without this error. This court should vacate Count I, and remand for sentencing on the lesser included offense of misdemeanor violation of a no contact order.

The trial court erred in denying appellant's motion to suppress the evidence derived from his illegal detention. There was no basis to interrogate and detain Mr. Barajas as the passenger of a car stopped for a license violation. This was particularly true because Mr. Barajas had left the car and was in an area of where he had a recognized privacy interest. This court should reverse the trial court's denial of the motion to suppress and vacate both convictions that flowed from this illegal detention.

The trial court erred in admitting evidence of one of the two prior convictions for violation of a no contact order, because the state submitted no evidence of the statute(s) under which Mr. Barajas had been convicted. The conviction on Count I should be vacated.

Mr. Barajas' trial counsel apparently did not review the Washington precedent applicable to prosecutions where a felony charge depends upon the proof of a predicate conviction. She failed to challenge the constitutional validity of either of the two prior convictions offered by the state as the two predicates for elevating what would have been a misdemeanor charge to a felony. This constitutes ineffective assistance of counsel. The court should vacate Count I, which was affected by the error by trial counsel.

The trial court erred in calculating Mr. Barajas offender score at the time of sentencing. The state did not provide proof that the conviction from the Aberdeen Municipal Court was for a repetitive domestic violence offense that had been both pled and proven. This court should vacate the sentence on Count I and remand for resentencing.

Dated this 31st day of OCTOBER, 2016

LAW OFFICE OF MARK W. MUENSTER

Mark W Muenster

Mark W. Muenster, WSBA 11228
Attorney for Appellant Scott Barajas

MARK MUENSTER LAW OFFICE

October 03, 2016 - 10:22 AM

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I hereby certify that I caused to be served a copy of: Appellant's Brief on Scott Barajas at the address shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 3rd day of October, 2016 with postage fully prepaid.

DATED this 3rd day of October, 2016

Mark W. Muenster

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